STATE OF MICHIGAN

COURT OF APPEALS

LIVINGSTON COUNTY,

Plaintiff-Appellant,

v

EDWARD F. HUBBEL, and JUDITH I. HUBBEL,

Defendants-Appellees,

and

JUDITH I. HUBBEL TRUST,

Defendant.

UNPUBLISHED
March 24, 2005

No. 255666
Livingston Circuit Court
LC No. 02-019223 CC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendants' motion for summary disposition under MCR 2.116(C)(4) and dismissing plaintiff's complaint for condemnation brought pursuant to the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.1 *et seq*, without prejudice based on a lack of subject matter jurisdiction. We affirm.

Plaintiff seeks to acquire 13.8 acres of real property in fee simple and an additional 12.2 acres of air space by way of an aviation easement from defendants. In August 1960, defendants leased to Panhandle Eastern Pipe Line Company ("Panhandle") the mineral and gas rights as well as the storage rights at the property, giving Panhandle the right to use the land for the exploration and removal of oil and gas and for the storage of foreign gas in the subsurface areas of the property. This lease was recorded with the Livingston County Register of Deeds. Before filing its complaint for condemnation, plaintiff tendered a written offer of just compensation to defendants; plaintiff did not tender any such offer to Panhandle. Defendants moved for summary disposition pursuant to MCR 2.116(C)(4), asserting that the trial court lacked subject matter jurisdiction because plaintiff's condemnation of the property impaired Panhandle's rights under the lease and therefore, plaintiff was required by the UCPA to make a good-faith offer to Panhandle before filing suit. The trial court agreed and granted defendants' motion, dismissing plaintiff's complaint without prejudice.

Plaintiff argues that the trial court erred in determining that it did not have subject matter jurisdiction because plaintiff is not trying to acquire any subsurface rights, and thus, plaintiff was not required to include Panhandle in its good-faith offer or in the complaint We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). Whether a court has subject matter jurisdiction is a question of law also reviewed de novo. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 160; 610 NW2d 613 (2000).

MCL 213.55 requires a public agency to establish an amount it believes to be just compensation for property it wishes to condemn and to submit to the owner(s) of that property a good-faith written offer to purchase the property for that amount. If, after making such an offer, the agency cannot reach agreement with property owner(s) for the purchase of the property, the agency "may file a complaint for the acquisition of the property" in the circuit court in which the property is located. MCL 213.55(1). Tendering a good-faith offer under MCL 213.55 is a necessary precondition to invoking the jurisdiction of the circuit court in a condemnation action; failure to tender a sufficient good-faith offer deprives the circuit court of subject matter jurisdiction. *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989).

It is well settled that a leasehold and the rights derived from it, constitute "property," the taking of which is subject to compensation. *Lookholder v State Hwy Comm'r*, 354 Mich 28, 35; 91 NW2d 834 (1958). Plaintiff did not tender a good-faith offer to purchase to Panhandle. Thus, if Panhandle's leasehold was impacted by the condemnation, under *Central Industrial Park, supra* at 17, the trial court lacked subject matter jurisdiction over plaintiff's complaint.

Plaintiff argues that it was not required to tender a good-faith offer to Panhandle because plaintiff was not condemning the subsurface mineral rights in the property, and thus, Panhandle's rights were not affected. In making this argument, plaintiff fails to distinguish Panhandle's mineral and gas rights from Panhandle's storage rights under the lease. We agree that Panhandle's mineral and gas rights are not impaired by plaintiff's condemnation. However, plaintiff's condemnation does impair Panhandle's storage rights.

In *Dep't of Transportation v Goike*, 220 Mich App 614, 617; 560 NW2d 365 (1996), this Court held that the "surface owner possesses the right to the storage space created after the evacuation of underground minerals or gas"; thus, only the surface owner possesses the right to use subsurface caverns for the storage of foreign minerals or gas. *Id.* at 618. In that case, the Department of Transportation had condemned property for improvement of a roadway, but did not condemn the "fluid mineral and gas rights," which were retained by the former owners of the property. The issue before this Court was, once the fluid minerals and gas were extracted from the property, as between the surface owner and the owner of the mineral rights, who owned the resulting underground storage space. *Id.* at 615. This Court reasoned that the plain meaning of the term "mineral right" was "a right to the minerals themselves, not to the land surrounding the minerals." *Id.* at 616. Therefore, the former owners retained only a right to the fluid minerals and gas themselves, not the storage space vacated by their removal. *Id.* at 616-617. So, "[w]hile [the former owners] may, of course, 'store' any fluid minerals or gas native to the chamber that has not yet been extracted, they cannot introduce any foreign or extraneous minerals or gas into the chamber. Only the surface owner, in this case [the Department of Transportation], possesses

the right to use the cavern for storage of foreign minerals or gas . . . after the [former owners] have extracted the native gas from the cavern." *Id.* at 617-618.

Applying *Goike* in the instant case, plaintiff's condemnation of defendants' property – despite excluding the subsurface mineral rights – impairs Panhandle's leasehold interest in the subsurface storage rights. While defendants would retain the right to the native fluid minerals and gas at the property, once condemned by plaintiff, they could no longer use the property for storage of foreign or extraneous materials – a right conferred to Panhandle under the lease. Therefore, Panhandle is an owner affected by plaintiff's condemnation action and plaintiff's failure to tender a good-faith offer to Panhandle as required by the UCPA deprived the circuit court of subject matter jurisdiction.

Plaintiff argues that defendants' delay in raising this issue, and their failure to identify it in prior pleadings, bars them from raising it at this late stage of the litigation. However, contrary to this assertion, it is well-settled that the court's lack of subject matter jurisdiction over an action may be raised at any time, including after trial has concluded and for the first time on appeal, and that it may not be waived or excused by the parties. MCR 2.116(D)(3); *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 486 (2002). Further, plaintiff argues that even if the trial court lacked subject matter jurisdiction, the proper result was to allow this action to continue and for plaintiff to bring a separate action against Panhandle. However, when a court lacks subject matter jurisdiction, any action it takes, other than to dismiss the complaint, is void. *Todd v Dep't of Corrections,* 232 Mich App 623, 628; 591 NW2d 375 (1998). Thus, the trial court was obligated to dismiss this action for want of subject matter jurisdiction. *Central Industrial Park, supra* at 17.

Plaintiff also argues that it is entitled to an order of possession regardless of the outcome of this appeal, because under MCL 213.57, title vested in plaintiff as of the date of the filing of the complaint for condemnation. MCL 213.57 does provide that title to the property shall vest in plaintiff as of the date on which the complaint was filed; such vesting shall not be delayed or denied for any reason other than a challenge to the necessity of the acquisition and occurs regardless whether the trial court has subject matter jurisdiction over the complaint. MCL 213.57(2); *Goodwill Chapel, v GMC,* 200 Mich App 84, 91; 503 NW2d 705 (1993).

However, while vesting of title at the time the complaint is filed is automatic under the UCPA, possession requires action by the trial court. MCL 213.59 provides that, in the absence of a challenge to the necessity of the acquisition, "the court shall fix the time and terms for surrender of possession of the property to the [condemning] agency." As this Court explained in *Dep't of Transportation v Jorissen,* 146 Mich App 207, 213, 379 NW2d 424 (1985), "The Legislature contemplated that the owner of the property would remain in possession until the trial court ordered surrender of possession or interim possession. Until that time, the owner of property retains possession of the property. An agency may not obtain possession absent an order of surrender of possession or interim possession." The absence of subject matter jurisdiction precludes the trial court from entering such an order. As discussed above, once it is determined that the trial court lacked subject matter jurisdiction, any action taken by that court – other than dismissing the complaint – would be void as a matter of law. *Todd, supra* at 628. In order to obtain possession of the property, plaintiff must refile the condemnation action, after providing all property owners with a good-faith offer to purchase, thus vesting the trial court

with subject matter jurisdiction, and then seek an order of possession from the trial court under MCL 213.59.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette